seem to be immaterial and hence raise no objection to its enforcibility. Accordingly, better considered cases construe such contracts as agreed valuations, properly within the contracting powers of the parties[19].

Since the risk assumed by a common carrier in transporting freight depends upon the value of the goods carried[20], a fair valuation agreement is a proper and lawful mode of adjusting the compensation to the risk[21]. The shipper usually accepts a special contract of shipment in order to obtain reduced rates. The carrier thus relies upon the agreement, and for the purposes of the contract, the goods should have no greater value than that agreed upon. The shipper is estopped to assert a greater loss[22]. The contrary doctrine not only ignores these considerations of justice toward the carrier, but also imposes an unwarranted hardship upon him in giving the shipper an advantage for which he did not pay. The preferable view holds stipulations similar to that condemned in the principal case conclusive on the shipper, since they in no way violate the ruling policy of the law of common carriers that the utmost care and diligence shall be secured.

PROPERTY RIGHTS IN WATER.—From earliest times, and under widely divergent systems of jurisprudence, flowing water has unavoidably remained unsusceptible of ownership[1]. Because of its fugitive character, it lacks the essential attribute ascribed to property, for no one can have an exclusive dominion over its corpus, and possession is inherent in our concept of ownership. At common law, therefore, there can be no seisin of a river,[2] although an action on the case is allowed for its diversion or diminution[3]. Moreover, under the conditions which fostered the growth of our common law, water was regarded as of no value, and the right to take water from the land of another was not a *profit a prendre*, but merely an easement[4]. But theories of jurisprudence must be readjusted by empirical considerations, and, as a matter of fact, to-day

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[19]George N. Pierce Co. *v.* Wells, Fargo & Co. (1911) 189 Fed. 561; and cases cited in note 12 *supra.*

[20]St. L. etc. Ry. Co. *v.* Weakly *supra;* Zouch *v.* Ches. & O. R. R. Co. *supra.*

[21]1 Hutchinson, Carriers, (3rd ed.) § 426.

[22]Richmond etc. R. R. Co. *v.* Payne *supra.* Where the shipper states a low value and receives a low rate, it would constitute a fraud upon the carrier to allow him to claim a full recovery. Harvey *v.* Terre Haute etc. R. R. Co. *supra.* Whether the shipper on requirement states the value and receives a rate accordingly, or receives a contract in which the valuation was previously inserted without inquiry, he is in either case estopped. Hart *v.* Penn. R. R. Co. *supra.*

[1]Mason *v.* Hill (1833) 5 B. & Ad. 1; McCarter *v.* Hudson Water Co. (1905) 70 N. J. Eq. 525; Embrey *v.* Owen (1851) 6 Exch. 353; Smith *v.* City of Rochester (1883) 92 N. Y. 463. For the view of the civil law, see 2 Inst. Tit. 1, § 1.

[2]Challenor *v.* Thomas (1609) Yelverton 143. The sum of the rights of riparian owners does not amount to property in the corpus of the water. See Fleming *v.* Davis (1872) 37 Tex. 173.

[3]Fulmer *v.* Williams (1888) 122 Pa. 191; Druley *v.* Adams (1882) 102 Ill. 177; McCord *v.* High (1868) 24 Ia. 336; Embrey *v.* Owen *supra.*

[4]Race *v.* Ward (1855) 4 E. & B. 702; Manning *v.* Wasdale (1836) 5 Ad. & E. 758.

water has a recognized worth all over the world[5]. Therefore when quantities are definitely separated from the stream and placed under control in a tank or reservoir, they should become personalty[6].

Besides the property gained by the possessor in specific particles of water thus impounded, a riparian owner, by reason of his access to the stream incident to the ownership of the land, also has usufructary rights in the flow[7]. He may divert portions of the water for ordinary purposes, but remains under an obligation to leave the flow substantially undiminished in quantity and undeteriorated in quality. This interest is, then, usufructary, and not absolute. But in the arid States of the West a principle unique in the law of waters was evolved by the new environment when a proprietorship was recognized in water diverted from the stream into ditches[8], and since the right to make the diversion was not dependent on the ownership of land, the corpus of the water was regarded as personalty. The right of the appropriator to use the water after it had entered his ditch was absolute, though before the water entered the ditch all which had not been applied to a beneficial use might be appropriated by others[9]. Later there has been an unfortunate attempt to reconcile these doctrines with common law principles, and to hold that water in ditches is not owned by the appropriator, who simply gains a usufructary right to the flow of a certain quantity[10], the corpus of which remains common to all. Even these courts, however, permit an appropriator to use water on his land although it diminishes the flow in the ditch[11], and it seems more logical to regard this water as personal property[12].

Apparently, then, water should be regarded either as not susceptible of ownership, or as contained in the category of personal property. There are expressions to the effect that water is as much a part of the land as the soil and rocks, but this is a doubtful application of the *"cujus est solum"* doctrine, for the modern tendency is to increase the limits of personalty at the expense of realty, and water is not, as a

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[5]See Calkins *v.* Sorosis Fruit Co. (1907) 150 Cal. 426; Mayor *v.* Richardson Boynton Co. (1911) 81 N. J. L. 278; Metcalf *v.* Nelson (1895) 8 S. D. 87; 12 COLUMBIA LAW REVIEW 745.

[6]Heyneman *v.* Blake (1862) 19 Cal. 579; King *v.* Chamberlain (1911) 20 Idaho 504; Metcalf *v.* Nelson *supra.* See dissenting opinion of Field J. in Spring Valley Water Works *v.* Schottler (1883) 110 U. S. 347; Hagerman Irrigation Co. *v.* McMurray (1911) 16 N. M. 172. Cases apparently contrary to this may be distinguished on the ground that actual control of the water was not gained. See Dilling *v.* Murray (1885) 6 Ind. 324; Mayor *v.* Commissioners (1847) 7 Pa. 348.

[7]Hough *v.* Doylestown (Pa. 1870) 4 Brewster 333; McCord *v.* High *supra;* Scriver *v.* Smith (1885) 100 N. Y. 471.

[8]Miller *v.* Wheeler (1909) 54 Wash. 429; see Kidd *v.* Laird (1860) 15 Cal. 162; Hoffman *v.* Stone (1857) 7 Cal. 47.

[9]Dick *v.* Caldwell (1879) 14 Nev. 167; Sowards *v.* Meagher (1910) 37 Utah 212; Power *v.* Switzer (1898) 21 Mont. 523.

[10]Salt Lake City *v.* Water etc. Co. (1901) 24 Utah 249; San Joaquin etc. Co. *v.* Stanislaus Co. (1911) 191 Fed. 895; Stanislaus Water Co. *v.* Bachman (1908) 152 Cal. 716.

[11]Calkins *v.* Sorosis Fruit Co. *supra.*

[12]Hesperia etc. Co. *v.* Gardner (1906) 4 Cal. App. 357; Hagerman Irr. Co. *v.* McMurray *supra;* Heyneman *v.* Blake *supra;* Butte etc. Co. *v.* Vaughn (1858) 11 Cal. 143; Hoffman *v.* Stone *supra;* Kidd *v.* Laird *supra;* Miller *v.* Wheeler *supra.*

matter of fact, necessarily a part of the soil. Certainly it is an anomaly to apply this doctrine to running streams, caused, no doubt, by a confusion of the corpus of the water, which cannot well be real property, with the right to abstract it, which is realty at common law.

In a recent case in India, Chockalingam Pillai (1912) 2 Mad. W. N. 219, some of the foregoing principles were illustrated. The government had diverted water into a canal for irrigation purposes. The defendant opened a gate, permitting the water to flow out on his land. It was held that the corpus of the water was personalty, and the defendant was therefore guilty of larceny in appropriating it. As physical conditions in India are similar to those in our Western States, this decision seems correct, though it could not be supported upon common law principles[13].

[13]Only so much of the common law as is reasonably applicable to conditions in India should prevail there. Pollock, The Genius of the Common Law, 12 COLUMBIA LAW REVIEW 659, 671. This seems to have been overlooked in another Indian case. See Emperor *v.* Sheikh Arif (1908) L. R. 35 Calcutta 437.